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Emergency Adoptions

An agency may adopt new rules, or amendments to or revocations of existing rules, on an emergency basis if the agency determines that "an imminent peril exists to the preservation of the public health, safety, or welfare, or that a compelling public interest requires an emergency rule[s] [A]n agency may promulgate, at any time, any such [emergency] rule[s], provided the Governor first approves such rule[s]" [75 O.S., Section 253(A)].

An emergency action is effective immediately upon approval by the Governor or on a later date specified by the agency in the preamble of the emergency rule document. An emergency rule expires on July 15 after the next regular legislative session following promulgation, or on an earlier date specified by the agency, if not already superseded by a permanent rule or terminated through legislative action as described in 75 O.S., Section 253(H)(2).

Emergency rules are not published in the *Oklahoma Administrative Code*; however, a source note entry, which references the *Register* publication of the emergency action, is added to the *Code* upon promulgation of a superseding permanent rule or expiration/termination of the emergency action.

For additional information on the emergency rulemaking process, see 75 O.S., Section 253.

TITLE 310. OKLAHOMA STATE DEPARTMENT OF HEALTH CHAPTER 2. PROCEDURES OF THE STATE DEPARTMENT OF HEALTH

[OAR Docket #14-70]

RULEMAKING ACTION:

EMERGENCY adoption

RULES:

Subchapter 29. Criminal History Background Checks [NEW]

310:2-29-1. Purpose [NEW]

310:2-29-2. [RESERVED]

310:2-29-3. Implementation [NEW]

310:2-29-4. [RESERVED]

310:2-29-5. Appeals [NEW]

AUTHORITY:

Oklahoma State Board of Health, Title 63 O.S. Section 1-104; and Title 63 O.S. Sections 1-1947(T)(2) and 1-1947(Y).

DATES:

Comment Period:

October 1, 2013, through November 1, 2013

Public Hearing:

November 1, 2013

Adoption:

December 10, 2013

Effective:

Immediately on Governor's approval or February 1, 2014, whichever is later.

Expiration:

Effective through September 14, 2014, unless superseded by another rule or disapproved.

SUPERSEDED EMERGENCY ACTIONS:

"n/a"

INCORPORATION BY REFERENCE:

"n/a"

FINDING OF EMERGENCY:

Pursuant to Title 75 O.S. Section 253, the Department seeks Emergency adoption of the proposed rules. The requirements in Title 63 O.S. § 1-1947(Y), state, *the State Board of Health shall promulgate rules prescribing effective dates and procedures for the implementation of a national criminal history record check for the employers and nurse aide scholarship programs defined in Section 1-1945 of [Title 63 of the Oklahoma Statutes]. Said dates may be staggered to facilitate implementation of the requirements of this section.* This Emergency rulemaking action is necessary to provide for the staggered effective dates authorized in law; to protect the safety of vulnerable populations by implementing without further delay a more rigorous national criminal history records check for those caring for vulnerable adults in our state; and, to implement the program while grant dollars are available, thereby reducing the cost to the State, providers and applicants for background checks. An extension to the current grant, awarded for the exploration and development of a fingerprint based national background check, has been offered to April of 2015. Upon an effective date for fingerprinting, grant funds will be utilized for seventy-five percent (75%) of fingerprinting costs for the duration of the grant. For each months delay in an effective date approximately eighty thousand

dollars (\$80,000) of grant funds will not be captured to assist in program start-up costs. The implementation dates for this program were dependent on software development and contracting with a vendor for a statewide network to provide live scan collection and digital submission of fingerprints to the State Bureau of Investigation. The software and live scan network contract were completed in December 2013.

ANALYSIS:

This proposal promulgates new rules in the procedures of the Department of Health as required in amendments to the Long Term Care Security Act (Title 63 O.S. § 1-1944 et. seq.), as adopted in 2012, House Bill 2582. This bill authorized fingerprint based criminal history background checks on those applicants who would be employed in a variety of long-term care settings as defined in the law at Title 63 O.S. Section 1-1945(4). The law at Title 63 O.S. § 1-1947(T)(2) requires that the Department shall specify rules for issuing a waiver of the disqualification or employment denial and further specifies in paragraph (Y) the State Board of Health shall promulgate rules prescribing effective dates and procedures for the implementation of a national criminal history record check for the employers and nurse aide scholarship programs defined in Section 1-1945 of Title 63 of the Oklahoma Statutes.

CONTACT PERSON:

James Joslin, Chief, Health Resources Development Service, Oklahoma State Department of Health, 1000 N.E. 10th Street, Oklahoma City, OK 73117-1207, phone 405-271-6868, or by e-mail to james@health.ok.gov.

PURSUANT TO THE ACTIONS DESCRIBED HEREIN, THE FOLLOWING EMERGENCY RULES ARE CONSIDERED PROMULGATED UPON APPROVAL BY THE GOVERNOR AS SET FORTH IN 75 O.S., SECTION 253(D), AND EFFECTIVE UPON APPROVAL BY THE GOVERNOR OR FEBRUARY 1, 2014, WHICHEVER IS LATER:

SUBCHAPTER 29. CRIMINAL HISTORY BACKGROUND CHECKS

310:2-29-1. Purpose

These rules implement the Long Term Care Security Act as established at Title 63 O.S. Section 1-1944 et seq., as amended.

310:2-29-2. [RESERVED]

310:2-29-3. Implementation

(a) Authority. Title 63 O.S. Section 1-1947(Y) authorized the Department to establish through rulemaking the effective

Emergency Adoptions

dates of subsections D through V of Section 1-1945 of Long Term Care Security Act, by category of employer.

(b) Effective dates. The effective dates for subsections D through V of Section 1-1947 (relating to screening and fingerprint based background checks) are defined below.

(1) For the following, compliance may begin February 1, 2014, but shall be required no later than March 1, 2014:

(A) Adult Day Care Centers as defined by Section 1-872 of Title 63 of the Oklahoma Statutes; and

(B) Residential care homes as defined by Section 1-820 Title 63 of the Oklahoma Statutes.

(2) For Specialized Nursing Facilities licensed pursuant to Title 63 O.S. Section 1-1901 et seq., compliance may begin February 1, 2014, but shall be required no later than April 1, 2014:

(3) For the following employers, compliance may begin February 1, 2014, but shall be required no later than May 1, 2014:

(A) Applicants for employment with the State Department of Health and Department of Human Services whose responsibilities include working inside long term care facilities, pursuant to Title 63 O.S. Section 1-1947(A)(1); and

(B) Nursing Facilities licensed pursuant to Title 63 O.S. Section 1-1901 et seq.,

(4) For the following employers compliance may begin February 1, 2014, but shall be required no later than June 1, 2014:

(A) Continuum of Care or Assisted Living facilities licensed pursuant to Title 63 O.S. Section 1-890.1 et seq.; and

(B) Hospice programs licensed pursuant to Title 63 O.S. Section 1-860.1 et seq.

(5) For Medicare Certified Home Care Agencies licensed pursuant to Title 63 O.S. Section 1-1960 et seq., compliance may begin February 1, 2014, but shall be required no later than July 1, 2014.

(6) For all other employers defined in Title 63 O.S. Section 1-1945(4), compliance may begin February 1, 2014, but shall be required no later than August 1, 2014.

(7) For Nurse Aide Scholarship Programs operated under contract with the Oklahoma Health Care Authority compliance may begin July 1, 2014, but shall be required no later than August 1, 2014.

(8) For staffing agencies or independent contractors as defined in Title 63 O.S. Section 1-1945(4), compliance shall match the contracted employer.

(9) Pursuant to Title 63 O.S. Section 1-1947(I)(5), *Medicaid home and community-based services waived providers as defined in Section 1915 (c) or 1915 (i) of the federal Social Security Act may voluntarily participate in the submission of fingerprints for applicants. In lieu of fingerprinting, said providers shall obtain a name-based state criminal history record check from the [Oklahoma State Bureau of Investigation] at the fee established in Section 150.9 of Title 74 of the Oklahoma Statutes. No other fees shall apply to said providers relying on a name-based state criminal history record check. The*

determination of employment eligibility shall be made by said providers based on the criteria established in subsection D of [Title 63 O.S. Section 1-1947].

(c) Nurse Aide Scholarship Programs. For the purposes of complying with Title 63 O.S. Section 1-1947(G) (related to conducting a registry screening and criminal history record check), the Nurse Aide Scholarship Program may refer the applicant's application and release to the Department for registry screening and authorization to collect fingerprints.

(d) Alternate Name Based Background Check. Where the Department is unable to authorize the collection and submission of fingerprints through an authorized collection site pursuant to Title 63 O.S. Section 1-1947(I), the Department shall conduct a name based search of the applicant in the criminal history database maintained by the Oklahoma State Bureau of Investigation.

310:2-29-4. [RESERVED]

310:2-29-5. Appeals

(a) Notice. A determination by the Department that finds an applicant not eligible for employment will result in a notice to the applicant to *include the reasons why the applicant is not eligible for employment and a statement that the applicant has a right to appeal the decision made by the Department regarding the employment eligibility. The notice shall also include information regarding where to file and describe the appellate procedures* [63 O.S. § 1-1947(K)(2)].

(b) Days to initiate an appeal. Pursuant to Title 63 O.S. 1-1947(T)1, any individual who has been disqualified from or denied employment by an employer pursuant to Title 63 O.S. Section 1-1947 *may file an appeal with the Department within thirty (30) days of the receipt of the notice of disqualification.*

(c) Types of appeals. An applicant may appeal the determination by:

(1) Challenging the finding that the applicant is the true subject of the results from a name-based registry background check;

(2) Challenging the criminal history record as inaccurate; or

(3) Requesting a waiver which gives the applicant the opportunity to demonstrate that the applicant should be allowed to work because he or she does not pose a risk to patients, facilities or their property.

(d) Inaccuracy of criminal history record. To demonstrate that the criminal history record is inaccurate, the applicant shall submit to the Department written documents, issued and certified by a governmental entity that demonstrate that the information contained in the criminal history report is inaccurate.

(e) Criteria for consideration in a waiver review. Pursuant to Title 63 O.S. Section 1-1947(T)(2), the Department shall consider the following criteria in considering whether the applicant merits a waiver of the applicant's determination of ineligibility:

(1) The time elapsed since the disqualifying criminal conviction, whether the applicant has fulfilled the sentence

requirements, and whether there are any subsequent arrests or convictions of any nature;

(2) Any extenuating circumstances such as the offender's age at the time of conviction, substance abuse history and treatment, or mental health issues and treatment;

(3) Rehabilitation as demonstrated by character references and recommendation letters from past employers, the applicant's record of employment history, education, and training subsequent to conviction; and

(4) The relevancy of the particular disqualifying information with respect to the proposed employment of the individual to include the job type and duties, the extent to which the applicant has unsupervised access to service recipients, whether the crime was committed against a vulnerable child or adult, and whether the conviction was related to an employer subject to the requirements of the Long Term Care Security Act.

(e) Where to file. The applicant's appeal shall be submitted in writing to the Administrative Hearings Clerk for the Oklahoma State Department of Health, 1000 Northeast 10th Street, Oklahoma City, OK 73117, and shall address the criteria specified in (d) of this Section and how the applicant merits a waiver of the disqualification from employment.

(f) Conduct of hearing. The appeal shall be conducted as an individual proceeding pursuant to this Chapter and the Administrative Procedures Act.

[OAR Docket #14-70; filed 1-21-14]

**TITLE 435. STATE BOARD OF MEDICAL LICENSURE AND SUPERVISION
CHAPTER 10. PHYSICIANS AND SURGEONS**

[OAR Docket #14-69]

RULEMAKING ACTION:

EMERGENCY adoption.

RULES:

Subchapter 7. Regulation of Physician and Surgeon Practice
435:10-7-12. Establishing a physician/patient relationship; exceptions
[NEW]

AUTHORITY:

Title 59 O.S., Section 489, Board of Medical Licensure and Supervision

DATES:

Comment period:

September 16, 2013 through November 5, 2013

Public Hearing:

November 7, 2013

Adoption:

November 7, 2013

Effective:

Immediately upon Governor's approval

Expiration:

Effective through September 14, 2014, unless superseded by another rule or disapproved by the Legislature.

SUPERSEDED EMERGENCY ACTIONS:

n/a

INCORPORATIONS BY REFERENCE:

n/a

FINDING OF EMERGENCY:

This emergency rule addresses urgent medical needs for the citizens of Oklahoma. The rule improves access to medical immunizations, facilitates care to hospice patients and speeds treatment of STDS and infectious bacterial diseases. The rule allows physicians to cover the practice of another physician, insuring continuity of care. It also is the first step in updating regulation of the use of telemedicine by medical doctors.

ANALYSIS:

New rule OAC 435:10-7-12 sets out that a face-to-face meeting between the physician and patient is not required under certain circumstances when establishing a physician/patient relationship. Circumstances would include physicians covering another physician's practice when issuing a refill if they have access to the complete medical record, hospice medical directors ordering medication as requested by licensed hospice employees with verification as being appropriate by the hospice record, physicians practicing in the state via telemedicine using certain criteria, and providers treating either a laboratory-verified, sexually-transmitted disease or persons who have been in contact with an infectious bacterial disease.

CONTACT PERSON:

Kathy Plant, Executive Secretary, 405-962-1400, ext. 122

PURSUANT TO THE ACTIONS DESCRIBED HEREIN, THE FOLLOWING EMERGENCY RULES ARE CONSIDERED PROMULGATED AND EFFECTIVE UPON APPROVAL BY THE GOVERNOR AS SET FORTH IN 75 O.S., SECTION 253 (D):

SUBCHAPTER 7. REGULATION OF PHYSICIAN AND SURGEON PRACTICE

435:10-7-12. Establishing a physician/patient relationship; exceptions

A physician/patient relationship is established when a physician agrees by direct or indirect contact with a patient to diagnose or treat any condition, illness or disability presented by a patient to that physician, whether or not such a presenting complaint is considered a disease by the general medical community. The physician/patient relationship shall include a medically appropriate, timely-scheduled, face-to-face encounter with the patient, subject to any supervisory responsibilities established elsewhere in these rules except the following providers are not subject to the face-to-face encounter:

- (1) providers covering the practice of another provider may approve refills of previously ordered medications if they have access to the medical file of the patient.
- (2) Hospice medical directors may initiate prescriptions based on requests from licensed health care providers and on information from Hospice records.
- (3) Providers ordering appropriate medications for persons with laboratory-proven, sexually transmitted diseases and persons who have been in contact with certain infectious diseases.
- (4) Telemedicine physicians who meet the criteria set out in OAC 435:10-7-13 of this Subchapter.
- (5) Licensed healthcare providers providing medical immunizations, which may be implemented by means of standing order(s) and/or policies.

[OAR Docket #14-69; filed 1-21-14]